

Written Statement of
The Synthetic Organic Chemical Manufacturers Association
Before the
Committee on Government Reform
United States House of Representatives
The Impact of Regulation on U.S. Manufacturers: Spotlight on
the Environmental Protection Agency
September 28, 2005

Introduction

The Synthetic Organic Chemical Manufacturers Association (SOCMA) is pleased to offer comments on the White House Office of Management and Budget report to Congress entitled “*The Impact of Regulation on U.S. Manufacturers.*” SOCMA appreciated the opportunity to present testimony to the Subcommittee on Regulatory Affairs at the September 28, 2005 hearing and would like to supplement that testimony with the following discussion.

SOCMA is the leading trade organization representing batch manufacturers of specialty and custom chemicals, including many of the key ingredients found in pharmaceuticals, soaps, cosmetics, plastics, and many other industrial and construction products. SOCMA has approximately 300 member companies, which represent 400 batch processing facilities in the U.S., producing a vast array of chemicals with an estimated annual value of \$60 billion. Over 89% of SOCMA’s active members are small businesses.

SOCMA’s members are affected by a number of the environmental regulations highlighted in the OMB report, including Toxic Release Inventory (TRI), Spill Prevention, Control, and Countermeasures (SPCC), and the Definition of Solid Waste (DSW). We have also included a brief discussion on TSCA Section 12(b) for your consideration. These comments will focus primarily on the Definition of Solid Waste under the Resource Conservation and Recovery Act (RCRA). It is appropriate OMB and Congress scrutinize the impact of EPA programs on the regulated community and the

success of EPA efforts to reduce the burden of these programs on U.S. manufacturing. There are important burden reduction opportunities in the TRI program, clarity is needed in the SPCC program and lost business opportunities can be recovered by revising the definition of solid waste. Unfortunately, these three regulations have also been languishing in limbo and in need of repair for quite some time -- in some cases up to a decade. Even more unfortunate is that for all three of these regulations this is not the first round of burden reductions, clarifications, and revisions. The problems with these regulations have not changed, nor has their importance to stakeholders, yet the EPA has been slow to substantially review and revise these regulations.

We urge Congress to push EPA to make the changes needed to improve the effectiveness of these regulatory programs without hindering the ability of small businesses to function as profitable enterprises.

Eliminate Unnecessary Reporting Under TSCA Section 12(b).

Section 12(b) of the Toxic Substances Control Act (TSCA) requires exporters of certain regulated chemicals to notify EPA of their intent to export. Typically, EPA then notifies the importing country that they will be receiving a chemical that is subject to risk management regulations or chemical testing requirements under TSCA. Congress's intent under the statute was to ensure that countries were notified that a chemical coming from the U.S. could pose certain risks under particular conditions. However, when EPA wrote implementing regulations, the agency chose to disregard exemptions for very minute amounts, such as by-products, which includes a number of instances where there would not be any risk posed by the importation.

This goes against the intent of TSCA as a risk-based statute, and industry has repeatedly asked EPA to modify the regulations to incorporate a *de minimis* exemption, but the agency has thus far refused to act. SOCMA requests that this Committee urge EPA to exempt *de minimis* amounts from TSCA Section 12(b) regulations. A *de minimis* exemption could be enacted in such a manner as to not pose unreasonable risks to human health or the environment and it would further the free flow of goods internationally.

Improve Data Quality and Reduce Burden Under the Toxic Release Inventory Program.

The Toxic Release Inventory reporting regulations under the Emergency Planning and Community Right to Know Act (EPCRA) have been a major focus of EPA's burden reduction efforts over the past several years and SOCMA has been an active advocate on this important effort. As SOCMA has testified to this Committee in the past, there are meaningful burden reduction opportunities in this program, however, these simple changes have taken years to accomplish. The most recent round of TRI burden reduction discussion began in October 2002 when EPA had an online dialogue with stakeholders on suggested changes to the program. They held another online dialogue in February 2004. EPA held a stakeholder meeting in October 2004 and had a TRI National Conference in February 2005. On June 14, 2005 SOCMA's testimony to this Committee focused on the

TRI regulations. SOCMA applauds the outreach and discussions that EPA has had with stakeholders on the TRI Burden Reduction issue, however, outreach is only valuable when it is coupled with results.

The effort has finally borne some positive developments, such as changes to the reporting form, proposals to expand the use of the simplified reporting form (Form A), and exploration of alternate year reporting. These changes should reduce the reporting burdens of SOCMA's members and improve the quality of the data available to communities, but it is worth noting that the Form A changes were initially suggested to EPA in a 1991 petition. The regulated community's frustration, which SOCMA shares, stems from the fact that it took 14 years to propose relatively straightforward changes.. SOCMA requests that Congress assist EPA wherever possible in implementing alternate year reporting to help improve TRI information products and services.

Clarify Requirements Under the Oil Spill Prevention Control and Countermeasures Regulations.

The Spill Prevention, Control and Countermeasure regulations under the Oil Pollution Act are yet another set of regulations that have long needed fixing because of confusing requirements for secondary containment, integrity testing, loading racks, oil in process and electrical equipment, oil in mobile containers, etc.. In 2002, EPA finalized SPCC amendments that were intended to clarify many issues that have lingered since the inception of the program in 1980. However, these regulations were not clear enough, litigation ensued and compliance deadlines have been extended twice. Now the regulated community is waiting for an Inspection Guide and Notice of Data Availability (NODA) to clarify these issues.

SOCMA has been engaged in the SPCC issue since 2002 because virtually every chemical manufacturing site stores or uses oil. EPA has met with SOCMA and other stakeholders frequently and it truly has been a collaborative process. But again, SOCMA members are frustrated because it has taken three years for EPA to develop an Inspectors Guide—a guide that will still leave some issues unclear. Having these issues clarified in a rulemaking as opposed to guidance would be the most appropriate, however, with compliance dates looming, we are forced to accept guidance as the best alternative at this time.

Revising and certifying SPCC plans is neither trivial nor inexpensive . On average, this costs approximately \$10,000 per facility, so it can be costly for both small and large companies. It is critical that EPA clarify the remaining SPCC issues in a timely manner before companies spend additional resources to be in compliance. If not, an extension must be granted by October 2005 so that companies will have time to comply with the new amendments. Compliance extensions for SPCC requirements have in the recent past been published on the day before the compliance date, despite the fact that the need for an extension was obvious in the weeks prior. As a result, affected facilities

needlessly spent resources in an attempt to comply with uncertain rules, and frustration over the lack of final rules mounted.

Allow Increased Recycling Opportunities by Revising the Definition of Solid Waste.

The Definition of Solid Waste (DSW) under the Resource Conservation and Recovery Act, known as RCRA, defines what materials are hazardous wastes. Additional regulations under RCRA strictly control all aspects of hazardous waste management, including activities such as recycling and recovery. The fact that that so many stakeholders nominated this regulation for the OMB Report to Congress reflects the range of industries impacted by this rule. It also suggests the volume of lost opportunities for resource conservation that could be recovered by revising the definition of solid waste.

DSW is a confusing, complex and overly-conservative section of RCRA that impedes legitimate recycling efforts rather than fostering recycling. There are a number of instances where existing regulations prevent the recycling and recovery of valuable materials from wastes, one of the very activities that RCRA was established to promote. Currently, it is almost always cheaper to dispose of hazardous waste than to recycle it. In a world of *limited resources* this wastefulness makes little sense and needs to be remedied. While attempts have been made to change the definition of solid waste systematically to make it more practical, efficient and economical, the rule has yet to be revised.

Since 1980, EPA has defined solid waste to mean “materials destined for final, permanent placement in disposal units, as well as some materials that are destined for recycling” (66 FR 61558). It is the second clause of this phrase that has resulted in confusion about the extent of EPA’s authority. Several notable court cases have addressed the definition of solid waste and which materials EPA may or may not regulate. In the 1987 case of the *American Mining Congress v. EPA*, (AMC) the D.C. Circuit Court ruled that EPA overstepped its authority “in seeking to bring materials that are not discarded or otherwise disposed of within the compass of ‘waste’” (66 FR 61558). Based on this case and others, EPA promulgated a rule in 1998 that exempted the mineral processing industry from regulations on materials destined for reclamation. While this was a clear win for the mining industry, EPA’s resulting rule was too narrow to allow similar recycling in other industries even though comparable exemptions certainly could have been allowed and in fact appear to be envisioned by the court.

In the 2000 court case of the Association of Battery Recyclers (ABR) v. EPA, the D.C. Circuit Court repeated elements of its earlier AMC decision. The opinion of the court stated, “...Congress unambiguously expressed its intent that ‘solid waste’ (and therefore EPA’s regulatory authority) be limited to materials that are ‘discarded’ by virtue of being disposed of, abandoned, or thrown away” (66 FR 61558). Subsequently, EPA issued a proposal in 2003 excluding from the definition of “discarded” “any material generated and reclaimed within the same industry,” improperly basing this

language on the ABR court's description of the particular circumstance before it. (66 FR 61558). While this represents a positive step towards expanding the criteria for what materials may be recycled, EPA's most recent proposal is still far too limiting to achieve the resource conservation originally outlined in RCRA.

SOCMA has suggested alternatives to the current definition, submitted comments on various proposals pertaining to DSW, and met with EPA staff to voice member concerns. In October 2003, EPA published a proposal on redefining solid waste. SOCMA was pleased that EPA took this first step and submitted comments to EPA in February 2004 (*see attached*).

The main thrust of the proposed rule was to allow recycling only between facilities with the same NAICS (North American Industry Classification System) code, and it presented a range of recycling options for comment. SOCMA and its members have determined that the proposed rule, when implemented with a three-digit NAICS code, will provide substantial relief to its members and effectively promote increased recycling for the specialty batch chemical manufacturing sector. By contrast, if implemented with a four-digit NAICS code, the proposed rule would fail to provide any significant regulatory relief, as the four-digit NAICS codes fail to reflect the diversity of specialty chemical products manufactured by the specialty batch chemical manufacturing industry.

SOCMA's review of the proposed rule has confirmed that the use of a four-digit NAICS code would not provide significant relief, as the four-digit codes fragment the specialty batch chemical manufacturing sector into multiple subcategories and fail to encompass the range of manufacturing operations conducted within the industry. In fact, the narrow four-digit NAICS codes often fail to reflect the diversity of operations conducted even at the individual facility level, thereby raising facility classification difficulties due to the fluctuating product lines typical of specialty batch chemical manufacturing operations. EPA correctly anticipated many of these concerns of the specialty batch chemical manufacturing sector in its preamble discussion, but its proposal failed to suggest appropriate changes to overcome these hurdles.

Accordingly, if EPA pursues the four-digit NAICS code approach, SOCMA asks that EPA also issue a conditional exemption from the four-digit approach to promote recycling in the specialty batch chemical manufacturing sector. The exemption could be conditioned on: notifications to the EPA detailing where the recycled material was generated and where it will be reused; limiting the allowable storage time prior to recycling; documentation that the material is stored, shipped and managed in a manner to prevent a release to the environment; and records proving that the material was ultimately recycled.

SOCMA also supports EPA's pursuit of a broader exclusion from the definition of solid waste beyond the "same generating industry," given the additional legitimate recycling opportunities that could be pursued under this approach. The broader exclusion would identify additional categories of inter-industry recycling activity that do not involve discarding waste materials and hence would appropriately be exempt from the

definition of solid waste. SOCMA supports this further action, but considers it critical that this be undertaken as a supplemental and complimentary effort to the options more fully developed and set out in the proposed rule.

SOCMA recognizes that, conceptually, further pursuit of this broad exemption could be viewed as obviating the need for separate action on the NAICS-based exemption proposed by SOCMA and the on-site recycling exemptions set out in the proposed rule. However, SOCMA urged EPA to pursue these options on separate tracks and not delay final action on the two more focused exemptions. SOCMA believes that EPA can and should issue a final rule establishing further focused exemptions from the definition of solid waste, while also developing the broader exclusion.

This regulation is very important as it has constrained current business opportunities for many industry sectors. Our attached testimony includes several examples of how the current definition restricts our members' ability to recycle valuable secondary (waste) materials.

As an example, one SOCMA member company makes an active intermediate chemical that is used in pharmaceutical production. That process generates approximately 2 million pounds per year of waste, 25% of which is tetrahydrofuran, a valuable material that is sold for about 90 cents per pound. The tetrahydrofuran cannot be used again in pharmaceutical production, but would be considered a valuable material for adhesive manufacturing. Whereas pharmaceuticals and adhesives manufacturing are both considered "chemical manufacturing" by the Department of Commerce, EPA's proposal using the more narrow industry sector definitions precludes this recycling opportunity. Compliance with both current regulations and the EPA proposal requires incineration of this waste stream at an annual cost of anywhere between \$573,000 to \$758,000. If the company were allowed to recycle the tetrahydrofuran, not only would over 600,000 pounds per year of the material be reused rather than incinerated, but sales of the recovered material would also generate an approximate profit of \$270,000 per year as well.

In the OMB Report to Congress, EPA has a schedule of December 2006 for a final rule. This date is three years after it was originally proposed and at least five years if not more since EPA had begun discussions with stakeholders on revising the regulation. SOCMA has met with EPA numerous times—both with the Policy Office and the Office of Solid Waste. SOCMA has also met with State officials and OMB to prod EPA to move quicker. Others within government are also interested, including the Department of Commerce and the U.S. House of Representatives Small Business Committee.

EPA has proven recently that they are capable of granting facility specific exclusions in a much faster manner than in the past. These individual exclusions were granted in less than a year with conditions—the same concept could apply across industry sectors. Similarly, SOCMA believes that a conditional exclusion for specialty batch chemical manufacturers based on the three-digit NAICS code would be the best way for

EPA to revise the definition of solid waste to allow for greater recycling of potentially valuable materials.

EPA has delayed revisions to the rule far too long now, affecting not only SOCMA members, but also an array of different industries. However, EPA has shown that they are indeed capable of producing timely results. SOCMA has made a compelling case to EPA for over ten years and yet the agency has not progressed beyond strategic discussions to revise the definition of solid waste regulations.

Conclusion

Focusing congressional attention on the slow pace of change to these EPA regulations gives hope to industry stakeholders. We have pushed for changes to the TRI, SPCC, TSCA 12(b), and DSW regulations for over a decade, but have seen few concrete results. The regulations as currently constructed have had a significant adverse effect on the small business community. The changes we have been recommending to EPA would help alleviate some of this burden without sacrificing environmental protection.

To summarize, we are asking EPA to:

- Clarify the requirements of the SPCC rules,
- Improve data quality and reduce burden in the TRI program,
- Eliminate unnecessary TSCA Section 12(b) reporting requirements, and
- Allow companies to realize recycling opportunities lost under the current definition of solid waste.

The OMB Report to Congress has helped get the agency moving on some of these long-awaited changes. Considering the length of time that these issues have been of importance to SOCMA and other stakeholders, however, it is disappointing that it is taking EPA so long to move to finality on any of them. We are hopeful that the combined efforts of EPA, OMB, Congress, and the regulated community will finally provide the momentum needed to get these critical changes enacted.